Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-51–02 OF 2014
AZIZUL AZMI J
24 OCTOBER 2019

Tort — Breach of statutory duty, Misfeasance in Public Office and Negligence — Whether plaintiff had proven all three causes of action against defendants — Plaintiff had applied to Malaysian Medical Council ('MMC') for accreditation of its medical degree courses — Whether MMC failed to follow its own accreditation guidelines in evaluating and determining the applications — Whether MMC had thereby breached its statutory duty under the Malaysian Qualifications Agency Act 2007 — Whether MMC was also vicariously liable for acts of negligence and misfeasance in public office committed by its Joint Technical Committee panel chairman ('JTC chairman') tasked with evaluating the applications for the purpose of accreditation — Whether JTC chairman by his actions had clearly shown targeted malice towards plaintiff — Whether MMC and JTC chairman had directly caused significant foreseeable loss and damages to the plaintiff by their tortious acts and were liable to make good the same

The plaintiff operated a private institution of higher learning ('LUC') and sought accreditation from the first defendant ('the MMC') of medical degree courses it wished to offer the public. The MMC was the ultimate authority empowered under s 52 of the Malaysian Qualifications Agency Act 2007 ('the MQA Act') to grant or refuse the accreditation. Before making its decision, the MMC was required by s 52 to consider the recommendations of its Joint Technical Committee ('the JTC') tasked to review and evaluate applications for accreditation. The MMC had prescribed guidelines ('the accreditation guidelines') for prospective applicants to follow in the process of obtaining accreditation in order to, among other things, maintain high standards in undergraduate medical education. At all material times in the instant case, the JTC panel which reviewed/evaluated the plaintiff's accreditation applications was headed by the second defendant ('D2') who was a member of the MMC. The plaintiff sued the defendants for breach of statutory duty, negligence and misfeasance in public office over the way they mishandled its accreditation applications. The two main incidents that prompted the plaintiff to file the suit were: (a) D2's insistence, when the panel first came to LUC's premises to evaluate its proposed new local medical degree course (MQA/PA 0927) that all first-year lecturers for the course — many of them foreigners — had to be physically present to be interviewed by the panel members. This insistence caught the plaintiff off-guard because such a requirement was never made

known to it earlier, nor was it specified in the accreditation guidelines. Nevertheless, the plaintiff incurred much inconvenience and expense to secure the attendance of 16 of the lecturers at the next visit by the panel two weeks later when only two of the lecturers were cursorily interviewed; and (b) the second incident was the panel's failure to evaluate an additional two new medical degree courses ('MQA/PA 1561' and 'MQA/PA 1562') which the plaintiff sought accreditation for. Initially, these two courses were foreign degree courses. In a 'twinning arrangement', the plaintiff had agreed with the foreign institution to conduct the first part of the two degree courses at LUC. However, following changes to the syllabi, the MMC approved the plaintiff's application to convert those two courses to become local medical degree courses offered by LUC. Despite MMC's approval, D2 maintained obliquely that the two said courses did not need evaluation because they had been absorbed into the MQA/PA 0927 course which had already been evaluated by the panel earlier. The plaintiff contended that by not adhering to its own accreditation guidelines, the MMC had breached its statutory duties under the MQA Act and the Medical Act 1971 and that it was also vicariously liable for D2's acts of negligence and misfeasance in public office while he was heading the JTC panels. The plaintiff claimed that because of the defendants' acts/omissions it had suffered substantial loss and damages.

Held, allowing the plaintiff's claim on all three causes of action and ordering damages to be assessed:

(1) The plaintiff had established that the MMC had breached its statutory duties under the MQA Act. The evidence was clear that the MMC had not adhered to its own accreditation guidelines in many respects but the most egregious breaches were: (a) the imposition of a new requirement, unilaterally imposed by D2, that lecturers had to be present for a pre-enrolment survey visit by the JTC panel; and (b) the failure of the JTC panel to evaluate the plaintiff's application for accreditation of the MQA/PA 1561 and MQA/PA 1562 degree programmes (see paras 59–60 & 70).

(2) The MMC had a statutory duty to adhere to its accreditation guidelines. A breach of that duty gave an aggrieved party who had suffered damages as a result a right of action against the MMC. The MMC was given the power and discretion to either approve or reject an application for accreditation. It had no power to decline to evaluate an application. It had a statutory duty to consider and determine each application for accreditation. The accreditation guidelines informed prospective applicants of the manner in which the power and discretion granted to the MMC under s 52 of the MQA Act would be exercised in approving or refusing accreditation. Once an authority had given guidelines on how it would exercise its power and discretion under the law, there would be imposed on that authority a duty to adhere to those guidelines. If the

substantive provisions of the accreditation guidelines were not adhered to and additional undocumented requirements were imposed on an applicant, such an act would amount to a breach by the MMC of its duty under s 52 to properly evaluate the recommendations of the JTC and to exercise its power and discretion in accordance with the law (see paras 66–68 & 76–77).

(3) Section 52 of the MQA Act accrued for the benefit of the public generally. It was enacted for the protection of the general public because it concerned the standards of higher education establishments generally, and specifically in the case of the MMC, the standards of medical care. Section 52 also accrued for the benefit of higher education establishments that proposed to offer degree programmes. The plaintiff had a right for its applications to be considered fairly and according to a rational set of principles applied consistently with all applications for accreditation. If the MMC did not properly consider the recommendations of the JTC or where it breached its own accreditation guidelines, the MMC would have breached its statutory duties under s 52 entitling the plaintiff to seek civil remedies for such breach (see paras 73–74).

(4) The MMC breached the duty of care it owed the plaintiff directly by failing to ensure that the accreditation guidelines were adhered to in the accreditation applications for MQA/PA 0927, MQA/PA 1561 and MQA/PA 1562. The MMC was also vicariously liable for the negligent acts of D2, who was its agent when he conducted the JTC survey panel visits. D2 had breached his duty of care to the plaintiff by imposing the requirement for all lecturers to be present at the pre-enrolment survey panel visit and also in declining to evaluate the MQA/PA 1561 and MQA/PA 1562 degree courses by unilaterally regarding them as having been absorbed into the MQA/PA 0927 local course contrary to what was decided by the MMC (see paras 87 & 94).

(5) The incurrence by the plaintiff of costs in procuring the attendance of the first-year lecturers for the JTC survey panel visit and the costs incurred in preparing for the evaluation of MQA/PA1561 and MQA/PA 1562 during the second survey panel visit were not remote but reasonably foreseeable by the defendants at the time the acts complained of were carried out. The costs and expenses incurred by the plaintiff were a direct consequence of the defendants' actions and there were no intervening factors that broke the chain of causation. The plaintiff had relied upon both the MMC and D2 to ensure that the accreditation process, including the evaluation by the JTC panel, was carried out fairly and in accordance with the accreditation guidelines. The court found that all the elements of negligence had been proven against both the defendants (see paras 83–85, 89, 93 & 98).

(6) The power exercisable by the MMC to grant or to refuse accreditation was a power exercisable for a public purpose. There was clearly a public objective to be attained by the creation of, and adherence to, standards in the field of medical education. The role played by the MMC was central to the attainment of this objective, not just in approving applications for accreditation but also by defining what those standards were and creating procedures for the accreditation process. Accordingly, even though the MMC was not part of the public services, their members would be regarded as public officers for the purposes of the tort of misfeasance in public office (see paras 109–110).

(7) In imposing the requirement for the lecturers to be physically present during the pre-enrolment survey panel visit and by unilaterally re-designating the 'conversion' of the MQA/PA 1561 and MQA/PA 1562 degree courses as an 'absorption' of those courses into the MQA/PA 0927 local medical degree programme, D2 had demonstrated malicious conduct targeted at the plaintiff and motivated by some improper purpose. The MMC was vicariously liable to the plaintiff for D2's actions in relation to the tort of misfeasance in public office. The court was satisfied that all elements of the tort of misfeasance in public office had been proven against the defendants (see paras 113–115 & 120–123).

(8) The defendants' argument that s 110 of the MQA Act immunised them from any action by the plaintiff had no merit. Section 110 only provided protection in respect of acts or omissions in good faith. Neither of the defendants was entitled to rely upon s 110: the MMC could not do so because it was not the 'Council' referred to in s 110 ('Council' there referred to the Council of the MQA), while D2 could not do so because he had not acted in good faith (see paras 125–127).

(9) The defendants could not rely upon the 36-month limitation period specified in s 2 of the Public Authorities Protection Act 1948 because the earliest point at which the plaintiff's cause of action could be said to have accrued was 13 May 2011, which was the first day of the first survey panel visit. Since the plaintiff filed its writ on 6 February 2014, it was well within the period of limitation (see paras 128–131).

[Bahasa Malaysia summary

Plaintif mengendalikan sebuah institusi pengajian tinggi swasta ('LUC') dan mendapatkan akreditasi daripada defendan pertama ('MMC') kursus ijazah perubatan yang ingin ditawarkan kepada orang awam. MMC adalah kuasa tertinggi yang diberi kuasa di bawah s 52 Akta Agensi Kelayakan Malaysia 2007 ('Akta MQA') untuk memberi atau menolak akreditasi. Sebelum membuat keputusan, MMC dikehendaki oleh s 52 untuk mempertimbangkan cadangan Jawatankuasa Teknikal Bersama ('JTC') yang ditugaskan untuk

meneliti dan menilai permohonan untuk akreditasi. MMC telah menetapkan garis panduan ('garis panduan akreditasi') untuk calon pemohon untuk mengikuti dalam proses mendapatkan akreditasi untuk, antara lain, mengekalkan piawaian tinggi dalam pendidikan perubatan sarjana muda. Pada semua masa yang material dalam kes ini, panel JTC yang meneliti/menilai permohonan akreditasi plaintif diketuai oleh defendan kedua ('D2') yang merupakan anggota MMC. Plaintif menyaman defendan kerana melanggar kewajipan statutori, kecuaian dan kesilapan dalam pejabat awam dengan cara mereka memalsukan aplikasi akreditasinya. Kedua-dua insiden utama yang mendorong plaintif memfailkan saman itu adalah: (a) desakan D2, apabila panel pertama kali datang ke premis LUC untuk menilai kursus ijazah perubatan tempatan baru yang dicadangkan (MQA/PA 0927) bahawa semua pensyarah tahun pertama kursus ini — kebanyakan mereka warga asing — perlu hadir secara fizikal untuk ditemuramah oleh ahli panel. Desakan ini menangkap plaintif secara mengejut kerana syarat tersebut tidak pernah dimaklumkan terlebih dahulu, atau tidak dinyatakan dalam garis panduan akreditasi. Walau bagaimanapun, plaintif telah menanggung banyak kesulitan dan perbelanjaan untuk menjamin kehadiran 16 pensyarah pada lawatan seterusnya oleh panel dua minggu kemudian apabila hanya dua pensyarah yang ditemuramah secara segera; dan (b) kejadian kedua ialah kegagalan panel untuk menilai dua lagi kursus ijazah perubatan baru ('MQA/PA 1561' dan 'MQA/PA 1562') yang mana plaintif mahukan akreditasi. Pada mulanya, kedua-dua kursus ini adalah kursus ijazah luar negara. Dalam 'pengaturan berkembar', plaintif telah bersetuju dengan institusi luar negara untuk menjalankan bahagian pertama dua kursus ijazah di LUC. Walau bagaimanapun, berikutan perubahan kepada sukatan pelajaran, MMC telah meluluskan permohonan plaintif untuk mengubah kedua kursus tersebut menjadi kursus ijazah perubatan tempatan yang ditawarkan oleh LUC. Walaupun dengan kelulusan MMC, D2 mengekalkan bahawa kedua-dua kursus tersebut tidak memerlukan penilaian kerana mereka telah diserap ke dalam kursus MQA/PA 0927 yang telah dinilai oleh panel sebelum ini. Plaintif berpendapat bahawa dengan tidak mematuhi garis panduan akreditasi sendiri, MMC telah melanggar tugas statutorinya di bawah Akta MQA dan Akta Perubatan 1971 dan ia juga bertanggungjawab bagi tindakan kecuaian dan kesilapan D2 di pejabat awam semasa dia sedang mengetuai panel JTC. Plaintif mendakwa bahawa kerana tindakan/ketinggalan defendan ia telah mengalami kerugian besar dan ganti rugi.

Diputuskan, membenarkan tuntutan plaintif terhadap ketiga-tiga kausa tindakan dan memerintahkan ganti rugi untuk dinilai:

(1) Plaintif telah membuktikan bahawa MMC telah melanggar tugas statutorinya di bawah Akta MQA. Keterangan adalah jelas bahawa MMC tidak mematuhi garis panduan akreditasi sendiri dalam banyak aspek tetapi pelanggaran yang paling berat adalah: (a) pengenaan

keperluan baru, secara unilateral yang dikenakan oleh D2, bahawa pensyarah harus hadir untuk lawatan panel JTC tinjauan pra-pendaftaran; dan (b) kegagalan panel JTC untuk menilai permohonan plaintif untuk akreditasi program ijazah MQA/PA 1561 dan MQA/PA 1562 (lihat perenggan 59–60 & 70).

(2) MMC mempunyai tugas statutori untuk mematuhi garis panduan akreditasinya. Pelanggaran tugas itu menyebabkan pihak yang terkilan telah mengalami kerugian akibat tindakan MMC. MMC diberi kuasa dan budi bicara untuk sama ada meluluskan atau menolak permohonan untuk akreditasi. Ia tidak mempunyai kuasa untuk menolak untuk menilai sesuatu permohonan. Ia mempunyai tugas statutori untuk mempertimbangkan dan menentukan setiap permohonan untuk akreditasi. Garis panduan akreditasi memaklumkan pemohon cara-cara kuasa dan budi bicara yang diberikan kepada MMC di bawah s 52 Akta MQA akan dilaksanakan dalam meluluskan atau menolak akreditasi. Sebaik sahaja pihak berkuasa telah diberi garis panduan mengenai bagaimana ia akan menjalankan kuasa dan budi bicaranya di bawah undang-undang, maka akan dikenakan pihak berkuasa itu kewajipan untuk mematuhi garis panduan tersebut. Sekiranya peruntukan substantif garis panduan akreditasi tidak dipatuhi dan syarat-syarat tanpa dokumen tambahan dikenakan ke atas pemohon, tindakan sedemikian akan menjadi pelanggaran oleh MMC mengenai tugasnya di bawah s 52 untuk menilai dengan baik cadangan-cadangan JTC dan untuk menjalankan kuasa dan budi bicaranya mengikut undang-undang (lihat perenggan 66–68 & 76–77).

(3) Seksyen 52 Akta MQA terakru untuk faedah orang ramai secara amnya. Ia telah digubal untuk perlindungan orang ramai kerana ia mengambil kira piawaian pertubuhan pendidikan tinggi secara umumnya, dan khususnya dalam hal MMC, piawaian penjagaan perubatan. Seksyen 52 juga terakru untuk faedah pertubuhan pendidikan tinggi yang dicadangkan untuk menawarkan program ijazah. Plaintif mempunyai hak untuk permohonannya dipertimbangkan secara adil dan mengikut prinsip-prinsip rasional yang diterapkan secara konsisten dengan semua permohonan untuk akreditasi. Sekiranya MMC tidak menimbangkan cadangan JTC atau jika ia melanggar garis panduan akreditasi sendiri, MMC akan melanggar tugas statutorinya di bawah s 52 yang melayakkan plaintif untuk mendapatkan remedi sivil bagi pelanggaran tersebut (lihat perenggan 73–74).

(4) MMC melanggar tanggungjawab terhadap plaintif secara langsung dengan gagal memastikan garis panduan akreditasi dipatuhi dalam permohonan akreditasi MQA/PA 0927, MQA/PA 1561 dan MQA/PA 1562. MMC juga bertanggungjawab untuk tindakan kecuaian D2, yang merupakan ejennya semasa beliau menjalankan lawatan panel tinjauan

JTC. D2 telah melanggar kewajipannya terhadap plaintif dengan mengenakan syarat untuk semua pensyarah hadir di lawatan panel tinjauan pra-pendaftaran dan juga menolak untuk menilai kursus-kursus ijazah MQA/PA 1561 dan MQA/PA 1562 dengan secara unilateral menganggap mereka seperti telah diserap ke dalam kursus tempatan MQA/PA 0927 yang bertentangan dengan apa yang diputuskan oleh MMC (lihat perenggan 94 & 87).

(5) Tanggungan oleh plaintif kos untuk mendapatkan kehadiran pensyarah tahun pertama untuk lawatan panel tinjauan JTC dan kos yang dilakukan untuk membuat penilaian MQA/PA1561 dan MQA/PA 1562 semasa lawatan panel tinjauan kedua tidak jauh tetapi dapat dilihat secara wajar oleh defendan pada saat tindakan yang diadukan dilakukan. Kos dan perbelanjaan yang ditanggung oleh plaintif adalah akibat langsung dari tindakan defendan dan tidak ada faktor campur tangan yang memutuskan rantaian causation. Plaintif telah bergantung kepada MMC dan D2 untuk memastikan proses akreditasi, termasuk penilaian oleh panel JTC, dijalankan dengan adil dan mengikut garis panduan akreditasi. Mahkamah mendapati bahawa semua unsur kecuaian telah dibuktikan terhadap kedua-dua defendan (lihat perenggan 83–85, 89, 93 & 98).

(6) Kuasa yang boleh dilaksanakan oleh MMC untuk memberi atau menolak akreditasi adalah kuasa yang boleh digunakan untuk tujuan awam. Jelas terdapat matlamat umum untuk dicapai dengan penciptaan, dan pematuhan kepada, piawaian dalam bidang pendidikan perubatan. Peranan yang dimainkan oleh MMC adalah penting kepada pencapaian matlamat ini, bukan hanya untuk meluluskan permohonan untuk akreditasi tetapi juga dengan menentukan apa piawaian tersebut dan mewujudkan prosedur untuk proses akreditasi. Oleh itu, walaupun MMC bukan sebahagian daripada perkhidmatan awam, ahli-ahli mereka akan dianggap sebagai pegawai awam untuk tujuan tort misfeasance di pejabat awam (lihat perenggan 109 & 110).

(7) Dalam mengenakan keperluan pensyarah untuk hadir secara fizikal semasa lawatan panel tinjauan pra-pendaftaran dan secara unilateral menetapkan semula 'penukaran' kursus ijazah MQA/PA 1561 dan MQA/PA 1562 sebagai 'penyerapan' kursus-kursus tersebut ke dalam program ijazah perubatan tempatan MQA/PA 0927, D2 telah menunjukkan tingkah laku berniat jahat yang disasarkan kepada plaintif dan didorong oleh beberapa tujuan yang tidak wajar. MMC adalah bertanggungjawab terhadap plaintif untuk tindakan D2 berhubung dengan tort misfeasance di pejabat awam. Mahkamah berpuas hati bahawa semua unsur-unsur tort misfeasance dalam pejabat awam telah dibuktikan terhadap defendan (lihat perenggan 113–115 & 120–123).

(8) Hujahan defendan bahawa s 110 Akta MQA telah mengimunkan

mereka dari sebarang tindakan oleh plaintif tidak mempunyai merit. Seksyen 110 hanya memberi perlindungan berkenaan dengan perbuatan atau peninggalan dengan niat baik. Kedua-dua defendan tidak berhak bergantung kepada s 110: MMC tidak dapat berbuat demikian kerana ia bukan 'Majlis' yang dirujuk di s 110 ('Majlis' di sana merujuk kepada Majlis MQA), manakala D2 tidak dapat berbuat demikian jadi kerana dia tidak bertindak dengan niat baik (lihat perenggan 125–127).

(9) Defendan tidak boleh bergantung pada tempoh had 36 bulan yang ditentukan dalam s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 kerana titik paling awal di mana kausa tindakan plaintif boleh dikatakan telah terakru adalah 13 Mei 2011, yang merupakan hari pertama lawatan panel tinjauan pertama. Oleh kerana plaintif memfailkan writnya pada 6 Februari 2014, ia berada dalam tempoh had (lihat perenggan 128–131).]

Cases referred to

Bourgoin SA v Minister of Agriculture [1986] 1 QB 716, CA (refd)
Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 1 AMR 209; [2018] 3 CLJ 427; [2018] 1 MLRA 535, FC (refd)
Generation Products v Majlis Perbandaran Klang [2008] 6 MLJ 325; [2008] 6 AMR 733; [2008] 5 CLJ 417; [2008] 1 MLRA 747, FC (refd)
Government of Karnataka v Smt Gowramma Appeal (Civil) 2874 of 2001, SC (refd)
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440; [1991] 2 CLJ 999; [1990] 3 MLRH 403, HC (refd)
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur v Poh Yang Hong [2016] 6 MLJ 413; [2016] 6 AMR 595; [2016] 9 CLJ 297; [2016] 6 MLRA 257, FC (refd)
Racz v Home Office [1994] 2 AC 45, HL (refd)
Robert Francis Phipps v The Royal College of Surgeons of Edinburgh [2010] CSOH 58 (refd)
Three Rivers District Council and others v Bank of England [2000] 3 All ER 1, HL (refd)
Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru [1969] 1 MLJ 195; [1969] 1 MLRA 210, FC (refd)
Tony Pua v Dato' Seri Najib Razak [2019] MLJU 1343; [2019] 6 MLRA 432, FC (refd)
Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2017] 9 MLJ 1; [2017] 3 AMR 911; [2017] 8 CLJ 350; [2017] 2 MLRH 611, HC (refd)
Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2018] 3 MLJ 466; [2018] 1 AMR 328; [2018] 4 CLJ 361; [2018] 1 MLRA 419, CA

A *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409; [2010] 3 MLRA 78, FC (refd)

Legislation referred to

B Civil Law Act 1956 s 3(1)
Evidence Act 1950 ss 17, 21
Interpretation Acts 1948 and 1967
Malaysian Qualifications Agency Act 2007 ss 11, 39, 51, 52, 52(1), 106, 107, 110, 111
C Medical Act 1971 Second Schedule
Public Authorities Protection Act 1948 s 2

Gerard Lourdesamy & (A Devi with him) (Gerard Samuel & Assoc) for the plaintiff.
D *Wan Hafarizam (Nor Emelia Mohd Iszeham & Cik Nuraisha Alia with him) (Hafarizam Wan & Aisha Mubarak) for the defendant.*

Azizul Azmi J:

E INTRODUCTION

[1] The plaintiff, Asia Pacific Higher Learning Sdn Bhd, operates a private higher learning institution known as Lincoln University College. It commenced this suit against the Malaysian Medical Council ('the MMC') and
F the second defendant in connection with the conduct of the evaluation of medical degree programmes undertaken and to be undertaken by the plaintiff.

[2] The plaintiff claimed that, in carrying out its accreditation survey of the
G medical degree programmes offered by the plaintiff as well as the programmes that the plaintiff proposed to undertake, the defendants:

(a) were negligent;

(b) breached their statutory duty to the plaintiff; and

H (c) committed misfeasance in public office.

[3] Trial of the action proceeded on the question of liability only. It was only if liability was established that the court would proceed to hear and determine
I issues relating to damages.

[4] After a full trial of the action, I allowed the plaintiff's claim in all three causes of action against the defendants. I directed that damages be assessed before me. The reasons for my decision are recorded here.

MATERIAL FACTS

[5] The three causes of action advanced by the plaintiff were all premised upon the same set of factual circumstances. In the following paragraphs, I set out the background circumstances as well as the specific findings of fact at which I have arrived.

The registration and accreditation framework for medical practitioners

[6] The MMC is a statutory corporation created under the Medical Act 1971. Its president is an ex-officio position filled by the director general of the Ministry of Health.

[7] The MMC comprises medical practitioners appointed by the Minister for Health as well as practitioners who are elected by registered medical practitioners in Malaysia. A doctor must be registered with the MMC in order to practice medicine, and in to order to become registered, an applicant must hold a medical qualification that is prescribed in the Second Schedule to the Medical Act 1971. This schedule specifies the qualifying medical degrees from universities around the world. Amendments to the schedule may be made by the Minister in consultation with the MMC. In addition to these functions, the MMC exercises disciplinary jurisdiction over medical practitioners.

[8] The MMC is, in other words, a self-regulatory organisation.

[9] In order for a higher education institution to offer a diploma or degree programme in Malaysia, it must first obtain accreditation for that programme under the Malaysian Qualifications Agency Act 2007. The Malaysian Qualifications Agency ('the MQA') established under this Act acts an one-stop-shop for the accreditation process in whatever field or discipline of learning. Generally speaking, the MQA facilitates and coordinates the accreditation process, although it has the power under s 39 of the Malaysian Qualifications Agency Act 2007 to grant provisional accreditation, which is granted at the pre-enrolment stage. The MQA does not, however, grant the final or 'full' accreditation.

[10] A Joint Technical Committee ('JTC') is required to be established by the relevant professional body s 51 of the Malaysian Qualifications Agency Act 2007 to undertake the review of an application for accreditation. The JTC makes the necessary recommendations to the professional body, which then approves or refuses accreditation pursuant to s 52 of the Malaysian Qualifications Agency Act 2007. The JTC must comprise at least one officer from the MQA.

A **[11]** In the case of medical degree programmes, the relevant professional body is the MMC.

[12] From the preceding paragraphs, it can be seen that, in the case for an application for accreditation for a medical degree programme: the JTC is a committee of the MMC; the JTC undertakes the review of an application for accreditation; the JTC makes a recommendation to the MMC; and the MMC is the approving authority for an application for accreditation under the Malaysian Qualifications Agency Act 2007.

C **[13]** The 2007 Act does not, however, prescribe any criteria to be applied by the MMC (or by any other professional body) in approving an application for accreditation. These criteria have been established by the MMC by way of guidelines.

D **[14]** The MMC has adopted the Guidelines for the Accreditation of Malaysian Undergraduate Medical Education Guidelines ('the Accreditation Guidelines') on 12 April 2011, after they were endorsed by the JTC on 26 November 2010. The Accreditation Guidelines themselves describe their E purpose:

> 3. AIM OF DOCUMENT
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> The aim of this document is to provide educational guidelines for standards in undergraduate medial education, to describe the procedures for carrying out accreditation and new course approval and to provide guidelines for making F judgements and decisions about accreditation. B/10

[15] It is clear from the passage above that the Accreditation Guidelines provides guidance to prospective applicants for accreditation as to how the G MMC will exercise the statutory discretion conferred upon it by s 52 of the Malaysian Qualifications Agency Act 2007.

[16] Indeed, the MMC aspires for the Accreditation Guidelines to be much more than this: they are also intended to be a precedent for other countries to H follow, which is explained in the introduction to the guidelines in the following terms:

> This document provides operational guidelines for the assessment of individual medical schools against these criteria by means of a national or regional accreditation process. These guidelines are designed to be a template upon which I countries establishing accreditation programs can develop their own versions, irrespective of the state of development of their medical education system.

[17] In brief, the accreditation process begins with the assessment of the curriculum to be adopted for a new course. After a proposed programme has

been approved, the JTC will undertake a post-approval or pre-enrolment survey visit, to ensure that the school is able to meet the stipulated accreditation criteria. It is only after satisfaction of any post-approval conditions that the school may then start its first intake for any new course offered. Final accreditation is granted only when the first cohort of students graduate from the school. The progress of the school in administering the approved course is monitored throughout this process by survey visits from a panel that reports to the JTC.

The circumstances giving rise to the plaintiff's claim

[18] The plaintiff's claims centred around two survey visits undertaken by a panel appointed by the JTC to evaluate the medical programmes conducted by the plaintiff. The two survey panel visits were conducted on 13 and 27 May 2011 (the 'first survey panel visit') and on 29–30 April 2013 ('the second survey panel visit'). On both occasions, the survey panel was chaired by the second defendant, Prof Dato' Dr Wan Mohamed Bebakar.

[19] At the material time, the second defendant was a member of the MMC, having been appointed in 2008. He was also a member of the JTC between 2007–2011.

[20] On 6 December 2010, the MMC, through its president at the time, wrote to the plaintiff informing it that its application to offer three medical degree programmes on a twinning basis with three Ukrainian institutions: Danylo Halytsky Lviv National Medical University (MQA/PA 1562), Ivano-Frankivsk National Medical University (MQA/PA 1561) and Ternopil State Medical University (MQA/PA 1049).

[21] From 2011, the plaintiff also conducted a local medical degree programme (MQA/PA 0927).

[22] On 22 April 2011, the MMC wrote to the plaintiff informing it that its three offshore programmes had been approved by the Joint Technical Committee, subject to the condition that a follow up visit be conducted to ensure that appropriate action is taken in respect of certain areas of concern and suggestions set out in an attachment to the letter. The attachment contained, among others, the following condition:

> LUC need to establish their local programme before simultaneously enrolling students in collaboration with their foreign partners.

[23] The precise meaning of this condition was a matter of factual dispute between the parties. However, I considered that it would not be necessary to examine the circumstances surrounding this dispute, because it was not

relevant for the purposes of the plaintiff's pleaded case. Specifically, the plaintiff did not seek damages arising from the cancellations in October 2013 of the MQA/PA 1561 and MQA/PA 1562 medical degree programmes. The precise meaning of the condition referred to above was only relevant to the question of whether the MMC was entitled terminate or cancel those programmes.

The first survey panel visit

[24] The MQA on 5 May 2011 informed the plaintiff of a survey panel visit to evaluate the MQA/PA 0927 local medical programme on 13 May 2011. This survey panel visit was the first post-approval visit for the MQA/PA 0927 local medical programme. The initial approval was done purely on the basis of a documentary review of, among others, the syllabus of the programme. A coordination meeting was held on 11 May 2011.

[25] The survey panel comprised the second defendant as chair of the panel, Dr Rogayah Jaafar, Prof Dr Ahmad Hata Rasit (DW11) and Prof Dr Saman @ Saimy Ismail. Two members of the MMC secretariat, Dato' Perumal Chinaya and Dr Wan Mazlan Mohamed Woojdy (PW5, who was also the secretary to the MMC) were to be present at the 13 May 2011 survey panel visit as observers. As events turned out, Dr Wan Mazlan only attended in the afternoon of 13 May 2011.

[26] The plaintiff claimed that, during the survey panel visit on 13 May 2011, the second defendant insisted that the plaintiff must make the first year lecturers for the MQA/PA 0927 local medical programme physically present to be interviewed. At trial, the second defendant denied having communicated any such requirement to the plaintiff. His testimony was supported by his fellow panel member, Prof Dr Ahmad Hata Rasit (DW11). What was indisputable, however, was that the plaintiff did subsequently procure the presence of the lecturers on 27 May 2011 and had incurred significant expense in so doing.

[27] Against the evidence presented by the second defendant and Prof Dr Hata Rasit (DW11) were the following items of evidence:

(a) both Prof Datuk Dr Abdul Gani bin Mohammed Din (PW2), who was the dean of the plaintiff's medical faculty, and Prof Dr Amiya Bhaumik (PW9), who was the chief executive of the plaintiff, testified that the second defendant had required the physical presence of lecturers at the first survey visit, even though this requirement was not earlier communicated to the plaintiff during the coordination meeting held just two days earlier. Their testimonies in this regard were, in my considered opinion, admissible on the basis that the plaintiff had sought

to prove the statement against the maker of the statement. Their testimony would thus be admissible as an admission of a fact in issue under s 17 read together with s 21 of the Evidence Act 1950, and therefore would not offend the rule against hearsay;

(b) a former chairman of the MMC, Datuk Seri Hasan bin Abdul Rahman (PW1), testified that it was never the practice to require a medical school to employ teaching staff during the first post-approval visit. According to him, it was only after the course has commenced that the school would have to engage teachers and lecturers;

(c) Dr Wan Mazlan bin Mohamad Woojdy (PW5), who was initially not present at the survey panel visit, testified that he received a panicky call from Dato' Perumal (the other observer representing the MMC secretariat) in the morning of 13 May 2011. Dr Wan Mazlan confirmed with Dato' Perumal that it was not the norm to require lecturers to be present at a pre-enrolment survey panel visit, and asked Dato' Perumal to inform the second defendant that such a request was contrary to the applicable guidelines and had never been practiced before. He was later informed that the second defendant insisted that the plaintiff presented its lecturers, whereupon Dr Wan Mazlan attended at the plaintiff's campus in the afternoon of 13 May 2011. I was of the view that Dr Wan Mazlan's testimony regarding what Dato' Perumal had told him during the telephone conversation was admissible to show that such a conversation had taken place, although it would not be admissible to prove the truth of the contents of the statements made by Dato' Perumal (on account of the rule against hearsay). Of course, in as far as his testimony regarding what he had told Dato' Perumal, such evidence was admissible;

(d) it was not disputed that the lecturers have been made available at short notice on 27 May 2011. If no one had requested for their presence, then why would the plaintiff have gone to such trouble and expense to procure their attendance? and

(e) finally, the most damning evidence came from the second defendant himself. On 7 June 2011, the second defendant emailed the secretary of the survey panel, Dr Rogayah Jaafar (who had passed away before trial commenced) regarding the survey panel visit report that she had prepared, stating that he had amended the numbers in her report because 'we can only count those academic staff that [sic] already in Malaysia'. He went on to explain that the staff who were 'in pipe line' could not be counted as academic staff until they were physically in the campus, see J4/774 of the trial bundles. This email was consistent with the assertion that the second defendant did in fact impose such a condition on the plaintiff.

[28] In my judgment, the evidence lay overwhelmingly in favour of the plaintiff that the second defendant had indeed required the plaintiff to make its proposed lecturers available for interview during the first survey panel visit. The fact that the second defendant persisted in his untruthful testimony raised the question of what motive he had in putting the plaintiff to inconvenience and expense, and also called into question the veracity of the rest of his testimony in this case.

[29] Prof Dr Amiya Bhaumik testified that he found the second defendant's behaviour particularly galling because, after the plaintiff had taken the trouble to make the lecturers available on 27 May 2011, the second defendant interviewed just two of the sixteen lecturers present and even then in the most cursory manner, a matter that had caused great embarrassment to Prof Dr Bhaumik.

[30] The plaintiff also alleged that the members of the survey panel had made inquiries of students and staff outside of the designated meeting sessions, which was impermissible. Dr Wan Mazlan testified that he was present in a car being driven by a member of the plaintiff's staff when a member of the survey panel asked questions of the driver NOE/935. However, he also testified the practice of asking questions outside of the designated meeting sessions was not uncommon, even though it was contrary to the Accreditation Guidelines NOE/932.

[31] The survey panel tabled its report on the first survey panel visit to the JTC meeting held on 30 June 2011. The same report was discussed at the MMC meeting held on 12 July 2011. On 18 July 2011, the plaintiff was informed by the MMC of the outcome of the first survey panel visit. On 26 August 2011, the MMC informed the plaintiff that it was allowed to commence all its programmes.

The conversion of two offshore programmes

[32] The three offshore programmes were granted provisional accreditation by the MQA on 8 February 2012. Over the course of the next few months, modifications were made to the curricula of the three offshore programmes, culminating in an application C/19–22 from the plaintiff to conduct two of the three offshore programmes entirely in Malaysia: the Danylo Halytsky Lviv National Medical University (MQA/PA 1562) and Ivano-Frankivsk National Medical University MQA/PA 1561) medical degree programmes. On 5 February 2013, the MMC approved the plaintiff's application.

[33] The nature of the approval was a matter of some dispute between the parties. The plaintiff contended that the MQA/PA 1561 and MQA/PA 1562

medical degree programmes were converted into local medical degree programmes, whereas counsel for the defendant argued that these two programmes were merely absorbed into the MQA/PA 0927 local medical programme. The difference was significant, because of the subsequent conduct of the defendants in connection with the second survey panel visit in April 2013.

[34] In my view, the evidence clearly showed that, based on what was communicated between the plaintiff and the MMC, the MQA/PA 1561 and MQA/PA 1562 medical degree programmes were in fact converted into local medical degree programmes.

[35] The operative portions of the letters from the plaintiff of 2 January 2013 to the MMC stated as follows:

> Lincoln University College memohon agar program Doctor of Medicine (MD) (Offshore Campus) [MQA/PA 1561 and MQA/PA 1562] dilaksanakan sepenuhnya di Malaysia.

[36] In response, the letters from the MMC of 5 February 2013 B/247, E/52 stated as follows:

> 2. Dimaklumkan bahawa permohonan *Lincoln University College* bagi perlaksanaan program perubatan *Doctor of Medicine* (MD) [MQA/PA 1561 and MQA/PA 1562], sepenuhnya di Malaysia telah dibentangkan di Mesyuarat Jawatankuasa Teknikal Pengiktirafan Pengajian Perbuatan (JTPPP) pada 8 Januari 2013 lepas.
>
> ...
>
> 4. Sukacita dimaklumkan, JTPPP telah bersetuju meluluskan program LUC tersebut sebagai program MD (tempatan). Walau bagaimanapun, sebelum program tersebut dimulakan, suatu lawatan perlu diadakan untuk menilai kampus dan fasiliti berkaitan yang akan dimanfaatkan di dalam penyampaian program tersebut bagi menentukan kesesuaian pelaksanaan program, serta kuota pelajar yang dibenarkan.
>
> 5. Keputusan tersebut telah diperakukan oleh Majlis Perubatan Malaysia semasa Mesyuarat kali ke 312 yang diadakan pada 15 Januari 2013 lalu.

[37] The correspondence between the parties unequivocally established that the plaintiff had been told that the MQA/PA 1561 and MQA/PA 1562 medical degree programmes were approved as local MD programmes. There was no mention of absorption into the MQA/PA 0927 local medical degree programme.

[38] The minutes of the JTC meeting held on 8 January 2013 J1/2 supported this interpretation:

> Mesyuarat mengambil maklum dan bersetuju:

a. Meluluskan kedua-dua program tersebut sebagai program MD (tempatan).

[39] Learned counsel for the defendant relied upon the minutes of the 315th meeting of the MMC held on 16 April 2013, which recorded as follows C/62:

6.8. *STATUS TERKINI LINCOLN UNIVERSITY COLLEGE (LUC)*

Majlis dimaklumkan:

a. Pihak LUC ada memohon untuk menyerapkan program-program *off shore* di Ukraine kepada program tempatan.

b. Pada Mesyuarat Jawatankuasa Teknikal Pengiktirafan Program Perubatan (JTPPP) bil 1/2013 yang bertarikh 8 Januari 2013, permohonan LUC diluluskan untuk menyerapkan program-program *off shore* ini kepada program tempatan. Suatu lawatan akan dijalankan untuk menetapkan jumlah kuota yang dibenarkan kepada pihak LUC.

c. Prof. Dato' Dr. Wan Mohammad Wan Bebakar ingin mendapatkan kepastian samada LUC akan menjalankan hanya satu program tempatan ataupun tiga program tempatan yang berbeza selepas mendapat kebenaran JTPPP menyerapkan program *off shore* mereka ke dalam program tempatan.

Majlis mengambil maklum dan bersetuju :

a. LUC hanya menjalankan satu program tempatan sahaja. Program-program *off shore* mereka diserapkan ke dalam program tempatan yang sedia ada bukan sebagai program tempatan yang baru.

b. Keputusan jumlah kuota hanya boleh ditentukan selepas suatu lawatan pemantauan diadakan kelak.

[40] Although these minutes recorded that the two offshore programmes were absorbed into the existing local program, the fact remains that what had been communicated to the plaintiff was that these programmes were converted into the local programmes. The plaintiff had thus proceeded on the basis of the earlier approval granted by the MMC.

The second survey panel visit

[41] On 22 April 2013, the MQA wrote the plaintiff informing it of an upcoming survey panel visit on 29-30 April 2013 to monitor the provisional accreditation of three medical degree programmes: MQA/PA 0927, MQA/PA 1561 and MQA/PA 1562.

[42] This panel was again chaired by the second defendant. The remaining members of the panel were Datuk Dr Megat Burhainuddin Megat Abdul Rahman, Prof Dr D Kamarudin D Muin and Prof Madya Dr Yong Rafidah Abdul Rahman.

[43] Prof Dr Amiya Bhaumik (PW9), the chief executive of the plaintiff, testified that at the second survey panel visit, he was told by the survey panel that they would only be assessing the local medical degree programme MQA/PA 0927, as the other two offshore programmes MQA/PA 1561 and MQA/PA 1562 had been absorbed into MQA/PA 0927. This came as a surprise to Dr Bhaumik, as he had not previously been told of any such absorption. The significance of this is that if the programmes had been absorbed, then no further evaluation of the converted offshore programmes would be necessary, on the basis that the local programme would already be evaluated and assessed.

[44] For his part, the second defendant did not mention in his witness statement anything about the absorption of MQA/PA 1561 and MQA/PA 1562 into MQA/PA 0927. Instead, he referred to email communications between him and the liaison officer of the MQA on 12 April 2013 where he expressed concern about inadequate time having been set aside for the review of three programmes D2/4, marked as exh D46.

[45] Yet, as we have seen from the minutes of the MMC meeting held just four days later, the idea of the absorption was recorded as having been discussed, with the second defendant querying whether the plaintiff was running three separate local programmes or just the single MQA/PA 0927 local medical degree programme.

[46] It appeared as though the second defendant was telling the MQA one thing, and the plaintiff another. Why the discrepancy?

[47] The sequence of events was explained by Dr Wan Mazlan bin Mohamad Woojdy (PW5), the then MMC secretary NOE/897 et seq. On 11 April 2013, the MQA had written an e-mail to the MMC to inform it of a scheduled survey panel visit and empanelling the four doctors. Upon receipt of this email, Dr Wan Mazlan wrote back the following day, copying (among others) the members of the survey panel, informing that there were in fact three programmes to be evaluated D2/1, marked as exh P17. Some hours later, the second defendant then wrote to the MQA officer, copying Dr Wan Mazlan, stating that there was inadequate time to review three programmes. On Sunday, 14 April 2013, Dr Wan Mazlan suggested a meeting on Tuesday morning, 16 April 2013, in order to resolve the issue.

[48] This meeting went ahead on 16 April 2013, chaired by the second defendant. No MQA officers were present, due to the short notice. Dr Wan Mazlan explained what had gone on in the meeting in the following terms:

A What was discussed in the meeting according to the Chairman [the second defendant], he said no, we are supposed to visit only one programme because the two programmes had been absorbed. So because of that, we have got to visit only one programme. NOE/898

B **[49]** Dr Wan Mazlan attempted to explain to the second defendant that there had been no absorption based on the previous minutes of the JTC and the MMC. He even confirmed with the MQA after the meeting that there were three extant local programmes approved for the plaintiff. The issue of absorption, according to Dr Wan Mazlan, had never arisen before. It arose only C that morning of 16 April 2013.

[50] That very afternoon, the second defendant informed the meeting of the MMC that the two programmes had been absorbed into MQA/PA 0927. D According to Dr Wan Mazlan, the MMC meeting arrived at the conclusion that there was just one single programme and that the other two had been absorbed into MQA/PA 0927 because they were told so by the second defendant. Dr Wan Mazlan testified that he felt bullied by some of the members of the council by the fact that he was not allowed to speak and would E be cut off. He also felt that his future career prospects would suffer if he was too outspoken. Nonetheless, he attempted to explain to the council that there were three programmes and no absorption but his views were not taken into account. NOE/901

F **[51]** The MQA was never informed of the unilateral decision by the second defendant to regard the converted programmes MQA/PA 1561 and MQA/PA 1562 as having been absorbed into MQA/PA 0927. This was the reason why, when the MQA wrote to the plaintiff on 22 April 2013, the plaintiff was informed that all three local programmes were to be assessed by the survey G panel.

[52] The evidence painted a picture of the MMC as an organisation run with little accountability and, at best, a capricious disregard of the rights of persons H affected by the actions of the council. Persons perceived to be of a lower standing would be cowed into compliance, whilst more senior council members could force decisions upon the council, even if such decisions were inconsistent with its own prior decisions and that of the JTC.

I *July and October 2013 visits and termination*

[53] Following a complaint lodged by the plaintiff to the MMC, two further survey panel visits were conducted on 13–16 July 2013 and 1 October 2013.

These subsequent survey panel visits did not form that basis of any relief currently prayed for by the plaintiff, and hence I deal with them and the subsequent events in brief only.

[54] Following the July survey panel visits, a draft report of the survey panel was made available to the plaintiff. This report, however, was also only confined to MQA/PA 0927. The plaintiff made further representations to the MMC in September, following which a further survey panel visit was conducted on 1 October 2013.

[55] However, before the report for this survey panel visit could be prepared, the MMC wrote to the plaintiff on 11 November 2013. The plaintiff took this letter to mean that the MMC was terminating the offshore medical degree programme MQA/PA 1049 and the local medical degree programmes MQA/PA 1561 and MQA/PA 1562. The defendants initially disputed that this letter terminated the offshore programmes, and contended that the letter was merely advisory in nature in that the MMC was merely making a suggestion to this effect.

[56] In separate judicial review proceedings commenced before the High Court, it was held that this 11 November 2013 letter did amount to a termination, and that the discretion to terminate the courses had been improperly exercised. This decision was upheld by the Court of Appeal. The MMC's application for leave to appeal to the Federal Court was refused.

[57] The plaintiff did not seek damages in its judicial review action. After it obtained judgment in its favour in the judicial review action, the plaintiff sought to amend its statement of claim in this present action to claim for damages arising from the wrongful termination of the three medical degree programmes. I allowed this application, but this decision was reversed on appeal. At the time of writing, the plaintiff's appeal to the Federal Court was still outstanding.

BREACH OF STATUTORY DUTIES

[58] The plaintiff contended that the MMC breached the requirements of the Accreditation Guidelines and its statutory duties under the Medical Act 1971 and the Malaysian Qualifying Agency Act 2007.

[59] The evidence in this case was clear that the MMC did not adhere to the terms of its own Accreditation Guidelines. The instances of non-compliance are set out below:

(a) under the Accreditation Guidelines, an institution should be given four months' notice prior to a survey panel visit B/100. In the case of the first survey panel visit, the plaintiff was informed on 5 May 2013, when the visit was scheduled for 13 May 2013. In the case of the second survey panel visit, notification was given on 22 April 2013 of the visit on 29 April 2013. It may be argued that notification in both cases were given by the MQA. While this may be true, nonetheless, the Accreditation Guidelines contemplate notice being given by the JTC;

(b) under the Accreditation Guidelines, a survey panel ought to provide written comments on a medical school's written documentation prior to a survey panel visit B/102. No such comments were provided to the plaintiff on either of the survey panel visits in this case;

(c) immediately prior to the survey panel visit, the representative of the secretariat was supposed to have given to the school a tentative schedule, following which the schedule of the visit would be finalised between the school and the panel B/103. This again was not done for either of the survey panel visits undertaken with the defendant;

(d) the defendants breached the Accreditation Guidelines and the Malaysian Qualifications Agency Act 2007 by requesting for all lecturers to be present on a pre-enrolment survey panel visit. Nowhere in the Accreditation Guidelines were there requirements to this effect. Evidence was received from a past president of the MMC as well as its former secretary that this has never been the requirement at the pre-enrolment stage. Indeed, the former secretary of the MMC, Dr Wan Mazlan (PW5), pointed out that it would be on contravention of immigration laws for the lecturers to be present, as they would first need to be in possession of valid work permits, which in turn meant that they would have to be engaged in employment by the school, even where there is no certainty as to when the first intake of students would be admitted;

(e) the defendants failed to undertake a proper evaluation of MQA/PA 1561 and MQA/PA 1562 local degree programmes at the second survey panel visit, when the plaintiff had been informed that all three local degree programmes were supposed to have been evaluated during this visit;

(f) the Accreditation Guidelines provide that, once a draft report has been prepared by the secretary to the survey panel and all members of the survey panel has provided his or her comments on the draft, the following is then to occur:

> 5. The dean is asked to correct any errors of fact. If the dean disagrees with the tone or conclusions of the report, discussion should be held with the team secretary. If any points in the draft survey report remain in contention after informal discussion with the team secretary and chairperson, the dean may submit comments or appeal directly to Technical Committee to be

incorporated in the final report. B/105

(g) the draft reports of the survey panel visits were never provided to the plaintiff for its input to be incorporated into the reports.

[60] Of the above, the most egregious breaches were the imposition of a not-previously-imposed requirement that lecturers be present for a pre-enrolment survey visit and the failure to evaluate MQA/PA 1561 and MQA/PA 1562 local degree programmes at the second survey panel visit. From the evidence received at trial, it was clear that the plaintiff was put to expense in preparing for these survey panel visits, even if the precise quantum has not yet been determined in assessment proceedings. Of course, provisions of the Accreditation Guidelines need not be read as though they were legislation or a taxing statute; the document must be read a whole and taking into account the objectives of the Malaysian Qualifications Agency Act 2007 as well as the overarching aim of ensuring that standards of education in the medical field is maintained at a suitable level. Thus, one isolated instance of non-compliance of the Accreditation Guidelines may well not amount to a breach of the MMC's statutory duty, but where there are several serious instances of non-compliance in the same case, other breaches that would otherwise be relatively small instances of non-compliance would take on a new complexion and may well be symptomatic of impropriety against an applicant.

[61] The plaintiff alleged that there were other breaches of the Accreditation Guidelines, which I took the view had not been proven. These are:

(a) it was alleged that the defendants had failed to convene a coordination meeting prior to the second survey panel visit. While it is true that a coordination meeting was not conducted, I am not satisfied that there is an express requirement in the Accreditation Guidelines for a coordination meeting to be held. The meeting that is referred at para 3b of Part 1 of Appendix IV to the guidelines actually refer to an internal meeting of the members of survey panel, and not to a meeting with the representatives of the medical school B/101; and

(b) it was also alleged that the second defendant had conducted interviews and had asked questions of students and staff members outside the designated time and place to receive such feedback. I am of the view that the only instance where the evidence was properly before the court was in the case of the testimony of Dr Wan Mazlan (PW5), who had said that the panel had asked the driver of the car that was transporting them during the survey panel visit questions regarding the medical school. No specific evidence was led regarding the contents of those questions and answers. In any event, Dr Wan Mazlan by his own testimony indicated that this was a matter that happened in relation to other universities under review as well. In as far as the allegation regarding the interviewing

of students in non-designated places such as the *surau*, corridors and canteen, all the evidence before the court was inadmissible on account of hearsay.

[62] Do these instances of contravention of the Accreditation Guidelines amount to breaches by the MMC of its statutory obligations?

[63] In answer to this question, counsel for the defendants sought to argue that the Accreditation Guidelines do not have the force of law, and hence their contravention does not give rise to legal rights of the plaintiff.

[64] It is clear to my mind that the Accreditation Guidelines do not have the force of law. But it does not necessarily follow that their contravention does not have legal consequences.

[65] The Accreditation Guidelines do not seek to impose prohibitions on the public at large, or even on persons who are subject to the disciplinary jurisdiction of the MMC. That much is clear. To such extent, it may safely be said that the guidelines do not have the force of law, because their non-compliance do not have penal consequences on any person that are affected by them.

[66] Nonetheless, the Accreditation Guidelines provide guidance to prospective applicants on the manner in which the power and discretion that have been granted to the MMC pursuant to s 52 of the Malaysian Qualifications Agency Act 2007 will be exercised. Section 52(1) of the Act provides as follows:

> Section 52 Power to grant or refuse accreditation
>
> (1) After having considered the recommendation of the Joint Technical Committee under section 51, the relevant professional body may —
>
> (a) approve the granting of accreditation; or
>
> (b) refuse the granting of accreditation, stating the grounds for refusal.

[67] Once an authority has given guidance on how it will exercise its power and discretion under law, there will be imposed on that authority a duty to adhere to those guidelines. Of course, as alluded to earlier, not all breaches of guidelines will amount to a breach of this duty; whether this is so in any particular case will depend on the nature and circumstances of the breach and the proper construction of the guidelines in question, based on the principles explained at para 60 above.

[68] In this case, the MMC has issued the Accreditation Guidelines setting

out the requirements for accreditation and the procedures to be followed in an application for accreditation. It will be open to the MMC to make modifications to the process from time to time, and such changes to the guidelines ought to be communicated to potential applicants (which in this case would be institutions of higher learning proposing to offer medical degree courses in Malaysia). It may even depart from strict compliance with the guidelines where it would be appropriate to do so and where the decision is made with a proper purpose. Where however it is established that substantive provisions of the guidelines have not been adhered to and additional undocumented requirements are imposed on an applicant, such an act will amount to a breach by the MMC of its duty under s 52 to properly evaluate the recommendations of the JTC and to exercise its power and discretion in accordance with the law.

[69] Support for the principles set out in the preceding paragraphs can be found in the Federal Court decision of *Generation Products v Majlis Perbandaran Klang* [2008] 6 MLJ 325; [2008] 6 AMR 733; [2008] 5 CLJ 417; [2008] 1 MLRA 747, where Zaki Azmi PCA held as follows:

> [9] Public authorities are set up and derive their powers from statutes and that is why they are sometimes referred to as statutory bodies. The Act of Parliament would spell out their powers and more often than not Parliament also delegates powers to the Minister to make rules and regulations relating to implementation of that power. It is therefore trite law that a statutory body or authority has to look at the relevant provisions of the Act to determine its powers. The court will then in turn examine the impugned provision to decide whether the authority has acted within its powers. The court's duty is to ensure that these powers are exercised properly and within the prescribed terms. Lest it is misunderstood, there is also an immense variety of administrative powers which are non-statutory eg, formulation and implementation of government policies.
>
> [10] In some instances, the purpose or objectives of a provision are not clearly spelt out and courts must study other provisions of the relevant legislation in order to determine what the objective or the purpose of the provision is. The authorities cannot utilise their power conferred for one purpose towards achieving another purpose. It can only be used to achieve the end for which it is intended and not a related end. The exercise of a power towards an end which is outside the scope which is intended for it will be declared a nullity and struck down by the courts. When the law confers a power in broad terms, the court will examine whether the exercise of that power falls within the purpose for which it is intended (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 685).
>
> [11] When it comes to assessing whether the authority has exercised its power for any improper purpose, the motive of exercising the power is irrelevant. Unlike cases where the exercise of power is challenged on grounds of mala fide, when personal spite, animosity, malice, fraud, corruption or dishonesty becomes relevant. In respect of the earlier instance, however, even if the authority has the best of intentions, if its act falls outside the scope of the power conferred upon it, the

A exercise of power is deemed ultra vires and therefore liable to be declared void (see *Padfield v Minister of Agriculture and Fisheries* [1968] 1 All ER 694). The fact that the statute uses very general words does not mean that the exercising authority has the power that it claims. The court has to look at the objective and purpose of the law.

B

[70] It is thus established that there has been breach by MMC of its statutory duties under the Malaysian Qualifications Agency Act 2007. What are the consequences of breach of this statutory duty? Does it give rise to rights of persons who may be affected by the acts of the MMC?

C

[71] The answer depends on whether the particular provision of the statute accrued for the benefit of the public at large, or whether it was for the benefit of a specifically identifiable class of persons such as the plaintiff. If the former, the plaintiff does not have enforceable rights against the MMC, notwithstanding that there has been breach of the Accreditation Guidelines. It is only the latter case that gives rise to a right of the plaintiff.

D

[72] In the case of *Tok Jwee Kee v Tay Ah Hock & Sons Ltd and Town Council, Johore Bahru* [1969] 1 MLJ 195; [1969] 1 MLRA 210, the plaintiff sued the Town Council of Johore Bahru for alleged breach of the Town Boards Enactment by approving the construction of a building owned by the plaintiff's neighbour. It was contended that the building was not in compliance with the approved plan for Johore Bahru that has been approved by the ruler in council, and therefore the Town Council breached s 145 of the Town Boards Enactment by approving a non-conforming building plan. The Federal Court found that breach of s 145 by the Town Council did give rise to a right of the plaintiff for breach of statutory duty:

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> In my judgment the duty imposed on the Johore Bahru Town Council by section 145 is owed not only to the public generally but to a broad class — a particular definable class of the public of which the plaintiff is one. When the council zones an area for residential purposes, the zone benefits not only the inhabitants of the town generally, it benefits in particular the inhabitants of the zone. Persons buying land in the zone are prepared to pay an increased price because of the promise of peace and quiet and the attractions of living in a residential zone.

G

H

[73] On the facts of the present case, it is clear that s 52 accrues for the benefit of the public generally. It has been promulgated for the protection of the general public because it concerns the standards of higher education establishments generally and specifically in the case of the MMC, the standards of medical care.

I

[74] Nonetheless, s 52 also accrues for the benefit of higher education establishments that propose to offer degree programmes. This is a specifically

identifiable class of persons, of which the plaintiff is one. The plaintiff has a right for its applications to be considered fairly and according to a rational set of principles applied consistently with all applications for accreditation. Where, in exercising its powers under s 52, the MMC either does not properly consider the recommendations of the JTC, or where it breaches its own Accreditation Guidelines, the MMC would have breached its statutory duties under that section. For these reasons, the plaintiff is entitled to civil remedies against the defendants for breach of s 52.

[75] The High Court case of *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440; [1991] 2 CLJ 999; [1990] 3 MLRH 403 provides an excellent summary of the applicable principles. I can do no better than to reproduce the relevant passage in full:

> It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute; (b) the statutory duty imposes a liability to civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused his injury — see *Clerk & Lindsell on Torts* (14th Ed) para 1581. I should also bear in mind that a statute may impose a duty towards persons generally in which case no question can arise of whether the plaintiff is within the class protected. Furthermore it is also necessary to bear in mind that where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. An interesting case advocating this proposition is the case of *Schacht v The Queen in Right of the Province of Ontario* (1972) 30 DLR (3d) 641 (folld) to which I shall revert to later in this judgment. On the other hand, where the loss is occasioned by failure to exercise a power coupled with a discretion there is no liability — see *Great Central Railway Co v Hewlett* [1916] 2 AC 511. But a plaintiff is still entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power — see *David v Abdul Cader* [1963] 1 WLR 834. Finally I must remind myself that if a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action for otherwise 'the statute would be but a pious aspiration' (per judgment of Lord Simons at p 407 in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398).

[76] Within the context of the present case, the power is given to the MMC to either approve or reject an application for accreditation. In this sense, there is no discretion vested with the MMC to decline to evaluate an application, and hence the MMC has a statutory duty to consider and to determine each application for accreditation. There is, however, a discretion placed with the MMC to determine the applicable criteria and procedures to be applied in an application for accreditation. Where the MMC has published those criteria and procedures, then it must adhere to them, failing which there will be right of recourse against it by an applicant. Put another way, there is a statutory duty placed on the MMC to adhere to its Accreditation Guidelines, breach of which

may give rise to a right of an aggrieved party sounding in damages against the MMC.

[77] I add in closing that ss 106 and 107 of the Malaysian Qualifications Agency Act 2007 are penalty provisions for offences committed under the Act. Offences are criminal violations. Section 106 and 107 (which provide for general penalties and penalties for continuing offences respectively) apply in respect of the offences provided under Part XIV of the Act as well as any offence prescribed by regulations. It does not apply in connection with a contravention by a professional body of its obligations under s 52. Hence, the Malaysian Qualifications Agency Act 2007 does not provide for any remedy in the case of breach of s 52. It is therefore presumed that there exists a right of action in favour of any person suffering damages as a consequence of the failure by the MMC to adhere to its statutory obligations.

NEGLIGENCE

Ingredients

[78] In a claim for negligence, a plaintiff will need to establish the existence of a duty of care owed by the defendant, he must prove that there was a breach of that duty of care, and that the breach had caused damage to the plaintiff, and finally it must be shown that the damages claimed was not too remote, in that it was a reasonably foreseeable consequence of the breach.

Duty of care

[79] Three ingredients must be fulfilled in order to establish the existence of a duty of care between the parties:

(a) the damage must have been reasonably foreseeable;

(b) there must have been a relationship of proximity between the parties; and

(c) it must be just, fair and reasonable to impose a duty of care on the defendant.

[80] The above is a distillation of the dicta of Lord Bridge in the decision of the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, where it was held:

> [I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the

court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[81] I make the observation that the question of foreseeability of damage is considered twice in negligence cases: first when considering the existence of a duty of care, and again when considering the remoteness of damage.

[82] It is settled that a common law duty of care can arise in the performance of a statutory function: see *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur v Poh Yang Hong* [2016] 6 MLJ 413; [2016] 6 AMR 595; [2016] 9 CLJ 297; [2016] 6 MLRA 257 (FC).

[83] On the facts of this case, the incurrence by the plaintiff of the costs in procuring the attendance of the lecturers for the purposes of the survey panel visit would clearly have been foreseeable by the defendants. In addition, the costs incurred by the plaintiff in preparing for the evaluation MQA/PA 1561 and MQA/PA 1562 during the second survey panel visit would also have been foreseeable.

[84] There was, in my judgment, sufficient proximity between the parties: the second defendant was the chair of the survey panel on the two instances that formed the basis of the plaintiff's complaint. As the chair of the panel, the primary duty was upon the second defendant to ensure that the Accreditation Guidelines were adhered to, and the plaintiff was reliant upon the second defendant to ensure that the survey panel visit was conducted fairly and in accordance with the guidelines.

[85] Similarly, there was also a relationship of proximity between the plaintiff the MMC. The MMC was primarily responsible for the accreditation of medical degree courses in Malaysia, on the recommendation of the JTC. The JTC itself is not a legal entity but rather a committee of the MMC, as can be seen from s 51 of the Malaysian Qualifications Agency Act 2007. The plaintiff, as a higher education institution proposing to offer medical degree courses would have to engage closely with the MMC in order to obtain the necessary approvals.

[86] There was nothing to suggest that the imposition of such a duty would be unfair, unjust or unreasonable. The duty imposed on the defendants would not in my view have been unduly onerous: all that was required was adherence to pre-existing guidelines of which the second defendant would have been perfectly familiar and which the MMC itself had promulgated.

Breach of the duty of care

[87] The imposition of the requirement for lecturers to be present at a pre-enrolment survey panel visit was an indisputable breach of the duty of care that was owed by the second defendant to the plaintiff. In addition, the act of the second defendant in unilaterally reinterpreting the decisions of the JTC and the MMC in connection with the conversion of MQA/PA 1561 and MQA/PA 1562 also amounted to a breach of that duty of care.

[88] The MMC, in affirming the change from a conversion to an absorption at its 315th meeting on 16 April 2013, had itself committed a breach of its duty of care owed to the plaintiff. Furthermore, it had condoned the departure from the terms of its own Accreditation Guidelines.

Causation

[89] The costs and expenses incurred by the plaintiff were a direct consequence of the actions of the defendants, and hence I found that the element of causation was proven.

[90] The test for causation in negligence cases was explained by the Federal Court in *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409; [2010] 3 MLRA 78 in the following terms:

> [30] For the plaintiff to succeed in a claim for negligence, it is essential for him to prove among others that the injury caused to him was due to the defendant's negligence. There must be link between the wrongdoing and the damage caused. The burden of proving this link is upon the plaintiff — see *Bonnington Casting Ltd v Wardlaw*. In establishing this link between wrongdoing with injury there can be other possible causes. In such a situation, some courts have adopted the 'but for' test. Here the approach is not to identify all of the possible causes of a particular incident but focus on the effective cause of the resulting damage in order to assign responsibility for that damage caused. As confirmed by the authoritative text of *Clerk & Lindsell on Tort* (17th Ed) at paras 2–12, in majority of the cases this 'but for' test in practice operates well. But in situations where there are combined causes or several causes contributing to the wrongdoing then this 'but for' test may not be a satisfactory approach to determine causation.

[91] On the facts of the present case, the plaintiff would not have incurred the costs of the procuring the attendance of the lecturers for the pre-enrolment survey visits had it not been for the insistence of the second defendant that they be present.

[92] There may be other specific items of losses that were claimed by the plaintiff for which evidence had not yet been led, due to the bifurcated nature of the trial. In the assessment proceedings, the issue of causation may well have

to be revisited to ensure that these items of loss can properly be said to flow from a breach of duty by the defendants.

Remoteness of damage

[93] In my judgment, because the losses suffered by the plaintiff arose directly as a consequence of actions of the second defendant, there was no question of the damages being too remote. The loss suffered by the plaintiff would have been reasonably foreseeable at the time the acts complained of were carried out. There were also no intervening factors in this case that could be said to have broken the chain of causation.

Vicarious liability of the MMC

[94] The MMC's tortious liability to the plaintiff arose in two ways:

(a) first, the MMC directly owed a duty of care to the plaintiff that was breached by the fact that it had failed to ensure that the Accreditation Guidelines were adhered to in the accreditation process for MQA/PA 0927, MQA/PA 1561 and MQA/PA 1562; and

(b) secondly, the MMC was also vicariously liable for the acts of the second defendant, as the second defendant was an agent of the MMC when he conducted the survey panel visits.

[95] Vicarious liability does not only arise in employer-employee relationships. Where a defendant's relationship with the tortfeasor is one that is akin to employment, the defendant may be vicariously liable for the acts of the tortfeasor, even if the tortfeasor is not, in *stricto sensu*, an employee of the defendant. This determination is a question of fact, to be made based on an evaluative judgment after taking into consideration of all the surrounding circumstances. In *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 1 AMR 209; [2018] 3 CLJ 427; [2018] 1 MLRA 535, the Federal Court expressed the test for vicarious liability in the following terms:

> [T]he test for imposing vicarious liability on a defendant (D2) for the tortious act of a tortfeasor (D1) comprises two stages:
>
> (1) the relationship between D1 and D2 must be one of employment or sufficiently akin to employment; and
>
> (2) there must be a sufficiently close connection between that relationship and D1's tortious act.
>
> [112] The determination of a relationship of employment (or akin to employment) at stage 1 requires a consideration of multiple factors. In this exercise, the degree of control exercised by D1 over D2 is an important, albeit non-determinative, factor.

[96] In the present case, the second defendant was the chair of the two panels that conducted the survey visits in 2011 and 2013. It was not in material dispute that the function of the survey panels is to evaluate the relevant medical school's progress in preparing and implementing a medical degree programme. This is a process that begins with the first pre-enrolment visit and ends with the last visit prior to full accreditation once the first cohort of students graduates some five years later. The statutory responsibility for undertaking the accreditation process lies ultimately with the MMC, which the MMC may, by virtue of s 51 of the Malaysian Qualifications Agency Act 2007, delegate to the JTC. Under the aegis of the JTC, doctors are empanelled to undertake the visits to the medical schools to evaluate their progress. Even though the empanelment letter would in practice be issued by the MQA, the MQA does so only because of its coordination role between the various authorities involved (such as the Ministry of Higher Education). The fact remains that the function performed by the survey panel is in advancement of the discharge of the MMC's statutory duty under s 52 of the Malaysian Qualifications Agency Act 2007.

[97] The foregoing factors were, in my judgment, determinative of the issue of vicarious liability. They established that the MMC was vicariously liable for the negligent acts of the second defendant.

[98] In sum, I found all the elements of negligence proven against both defendants in this case.

MISFEASANCE IN PUBLIC OFFICE

[99] I found the defendants liable to the plaintiff for the tort of misfeasance in public office. During the hearing of arguments before me, the decision of the Court of Appeal in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466; [2018] 1 AMR 328; [2018] 4 CLJ 361; [2018] 1 MLRA 419 was not cited. The likely reason, I would venture, was that the grounds of judgment of the Court of Appeal was not yet available at the time. As such, the findings in this case did not take into consideration the decision of the Court of Appeal in that case. The ratio decidendi of the decision by the Court of Appeal is briefly discussed at para 111, post.

[100] The case that represents the locus classicus on the tort of misfeasance in public office is the decision of the House of Lords in *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1. The plaintiffs were some 6,000 depositors who had lost money in the collapse of Bank of Credit and Commerce International SA ('BCCI') in 1991. The plaintiffs sought to make the Bank of England, as the regulatory authority supervising

deposit-taking institutions, liable for misfeasance in public office by granting a licence to BCCI and by failing to revoke such licence when it became apparent that BCCI would collapse. Lord Steyn described the ingredients of the tort of misfeasance in public office as comprising the following:

(a) the defendant must be a public officer;

(b) there must have been an exercise of power as a public officer; and

(c) as regards the state of mind of the defendant, there must either have been:

(i) targeted malice by the public officer, ie conduct specifically intended to injure the plaintiff. The bad faith here involves the exercise of a public power for an improper or ulterior motive; or

(ii) knowledge by the public officer that he has no power to carry out the act complained of and that the act will injure the plaintiff. The bad faith arises in this case because the officer does not have an honest belief that his act is lawful;

(d) there must have been a duty owed by the defendant to the plaintiff. Here, the plaintiff must show sufficient legal interest to found a legal standing to sue. Proximity need not be established;

(e) there must be causation between the acts complained of and the damage suffered by the plaintiff; and

(f) the plaintiffs must have suffered damage that are not too remote. The test for remoteness of damage was expressed in the following terms: the plaintiff must establish either that the defendant acted in the knowledge that his act would probably injure the plaintiff or a person in a class of which the plaintiff was a member, or that the defendant did not care whether his acts would have such a consequence. This is stricter than the test of reasonable foreseeability applicable in negligence cases.

[101] It was once thought that the tort of misfeasance in public office was only actionable by individuals; however, the Court of Appeal case of *Bourgoin SA v Minister of Agriculture* [1986] 1 QB 716 now makes it clear that the cause of action available to companies as well.

[102] In the following paragraphs, I examine each element of the cause of action in the context of the facts of the present case.

'Public officer'

[103] Counsel for the defendants, Dato' Hafarizam, relied upon the decision of the High Court in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1; [2017] 3 AMR 911; [2017]

A 8 CLJ 350; [2017] 2 MLRH 611 for the meaning of 'public officer', and submitted that, following this decision, the defendants cannot be considered to be public officers for the purposes of the tort of misfeasance in public office and therefore the plaintiff's action would fail. In that case, the High Court found that in determining what was meant by the term 'public officer', regard must be B had to the Interpretation Acts 1948 and 1967 and to the terms of the Federal Constitution. By the proper construction of these provisions of written law, the prime minister was not a public officer for the purposes of the tort of misfeasance in public office.

C

[104] I disagreed with this finding. (It will be recalled that the subsequent decision of the Court of Appeal in *Tun Dr Mahathir Mohamad v Datuk Seri Mohd Najib Tun Hj Abdul Razak* was not cited in argument before me.) The reasons that I found myself unable to agree with the findings of the High Court D in that case were as follows.

[105] Firstly, in *Three Rivers District Council v Bank of England (No 3)*, the questions of whether the Bank of England was exercising a public function and whether the conduct of the named senior officials of the bank was in the E exercise of public functions were not in dispute between the parties. There was thus no need for Lord Steyn to explain at length what he considered to be a 'public officer' and 'public office'.

F **[106]** As a consequence—and this is the second point—it would be incorrect to focus on the words 'public officer' as used by Lord Steyn, as to do so would be to lose sight of the woods for the trees.

[107] The tort exists to provide recourse against unlawful exercise of a public G power or position. It should not matter whether the person exercising the power is a public servant or an employee of the Federation of Malaysia or any of its constituent states. For as long as the law devolves upon a person the power to make a decision in the public sphere, then the exercise of that power should be made the subject of legal control, on the basis that such a power must be H exercised for a proper purpose and must not be exercised in excess. Whether the person is an elected official, an employee of the state or even a volunteer is immaterial. It is the *public function* that is being performed by the person that should be made the proper subject of inquiry. The emphasis on the nature of the function that is being performed by the official is reflected in the following I passage of Lord Steyn's judgment:

> The conduct of the named senior officials of the Banking Supervision Department of the Bank was in the exercise of *public functions*. (Emphasis added.)

[108] Accordingly, the expression 'public officer' as used by Lord Steyn should not be read as though they form part of legislation. The term should instead be read widely to encompass any person exercising a public function. I found support for such an approach in the case of *Government of Karnataka v Smt Gowramma Appeal* (Civil) 2874 of 2001, a decision of the Supreme Court of India. I can do no better than to reproduce the relevant passages here:

> A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In *Quinn v Leathem* (1901) AC 495 (HL), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.
>
> 10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

[109] On the facts of the present case, I was of the view that the power exercised by the MMC to grant or refuse accreditation is a power exercisable for a public purpose. There is clearly a public objective to be attained by the creation of, and adherence to, standards in education for the medical field. The role played by the MMC is central to the attainment of this objective, not just in approving applications for accreditation but also by defining what those standards are, and creating procedures for the accreditation process. As stated in the Accreditation Guidelines themselves, the guidelines are held out as an exemplar to be followed even by the medical profession in other countries.

[110] Accordingly, even though the MMC is not part of the public services, their members would be regarded as public officers for the purposes of the tort of misfeasance in public office.

[111] The Outer Court of the Court of Session in Scotland came to the same conclusion in relation to the Royal College of Surgeons of Edinburgh. The Royal College has the power to confer accreditation on medical practitioners, which determines the advancement of the practitioners in the National Health Service. In *Robert Francis Phipps v The Royal College of Surgeons of Edinburgh* [2010] CSOH 58, the court was of the view that in discharging this function,

the members of the Royal College were public officers for the purposes of the tort of misfeasance in public office. The court stated:

> [11] Logically the first thing for proof ought to be that the defenders were exercising a public power ... The particular power in issue is clear. The chief executive and office-bearers of the defenders accepted that they were exercising an important public function in initially awarding and then later reviewing the accreditation of the pursuer. A letter of 23 November 2000 from the General Medical Council stated unequivocally that accreditation had always fallen under the auspices of the Royal Colleges. The defenders are a body established by Royal Charter and governed by a Council of office-bearers and fifteen other members. Like the other Surgical Royal Colleges in the British Isles they had at that time the final say on whether one of their fellows had completed higher surgical training that qualified him for further advancement in the profession and would virtually guarantee appointment to a post as a consultant surgeon in the NHS. They were part of a system designed to ensure that only those who were adequately trained held certification that appointment to consultant status was appropriate in what is probably the largest public service in the United Kingdom, overseen by the Department of Health under a team of Ministers presided over by the Secretary of State for Health. As such they were in my opinion clearly exercising a public function. Their position and role were analogous to those of the chartered accountants' disciplinary body — see Institute of Chartered Accountants of Scotland 2002 SLT 92 at para 12. The matter is neatly put by Buxton LJ in *Society of Lloyd's v Henderson & Others* [2007] EWCA Civ 930; [2008] 1 WLR 2255, at paras 23–24 as follows:
>
> > 23. Those formulations do not discuss how a 'public officer' is defined, and general authority on that point is not easy to find. That may well be because, as I suggest later in this judgment, the answer in almost every case is obvious. However, Lloyd's was able to point us to two relevant observations within the speeches in the Three Rivers case. Lord Steyn said... 'The rationale of the tort is that in a legal system based on the rule of law the executive or administrative power may only be exercised for the public good'; and Lord Hobhouse ... said that the tort concerned 'the acts of those vested with governmental authority and the exercise of executive powers'.
> >
> > ...
> >
> > 24. The requirement that the subject of misfeasance in public office should be a governmental body springs from the very nature of the tort. As Hale LJ pointed out ... the nature of the wrong is that a public official, who is given powers for public, governmental purposes, misuses them for a different purpose, conscious that in so doing he may injure the claimant'.
>
> While the defenders may not be accurately described as 'public officials', they were in this context exercising a public office in which they played a key role in regulating the determination of the qualification by training of doctors for appointment to senior posts in the NHS. That power had to be exercised for the public good.

[112] As explained previously, my decision in this case was delivered without

the benefit of the decision of the Court of Appeal in *Tun Dr Mahathir Mohamad v Datuk Seri Mohd Najib Tun Hj Abdul Razak*, where it was held that the *Three Rivers* case represented the common law of England, and should not be adopted wholesale and unquestioningly as the law of Malaysia. According to s 3(1) of the Civil Law Act 1956, there is reception of the English common law only as at 7 April 1956, and even then only in so far as the local circumstances permit. The Court of Appeal also affirmed the decision of the High Court in that case that the term 'public officer' must be ascertained with reference to the Interpretation Acts 1948 and 1967 and to the terms of the Federal Constitution and that accordingly the prime minister was not a public officer for the purposes of the tort of misfeasance in public office Note: On 19 November 2019 (after these grounds of judgment were issued), the Federal Court delivered its judgment in *Tony Pua v Dato' Seri Najib Razak* [2019] MLJU 1343; [2019] 6 MLRA 432, overruling the Court of Appeal in *Tun Dr Mahathir Mohamad v Datuk Seri Mohd Najib Tun Hj Abdul Razak*.

Malice

[113] I found the second defendant's conduct in imposing the requirement for lecturers to be physically present during a pre-enrolment survey panel to be malicious and motivated by some other purpose that can only reasonably be described as improper. Throughout trial, he maintained that he did not insist on the presence of the lecturers. His mendacious machinations were found out, however, when it transpired that he had written to a co-panellist informing her that he had amended the survey panel report to exclude the academics who were not yet present on campus, see para 27(e) above. This clearly and obviously corroborated the accounts by Prof Dr Bhaumik and Dr Wan Mazlan, who testified that the second defendant did impose such a requirement on the plaintiff. If he did not ask the plaintiff to present the lecturers at the survey panel visit, then why exclude those who were not physically present from the evaluation? (By way of explanation, the number of lecturers affects the teacher/student ratio, and in turn determines the approved quota of students for each intake).

[114] Once the plaintiff has proven that the second defendant did impose such a requirement on the plaintiff, and that no such requirement had previously been imposed on any applicant for accreditation, the evidential burden then lay with the second defendant to proffer some credible explanation why he had done so. No explanation was forthcoming from him, for he persisted in his denial. In the absence of a credible explanation from the second defendant, I found that the plaintiff has proven the contention that the second defendant imposed the requirement motivated by an improper purpose.

[115] I also found that it was the second defendant who was responsible for re-designating the *conversion* of MQA/PA 1561 and MQA/PA 1562 into an *absorption* of those programmes into MQA/PA 0927. The prior decisions of the JTC and the MMC clearly minuted that the two programmes were converted into local medical degree programmes. Yet, despite protestations from Dr Wan Mazlan, the MMC secretary at time, he unilaterally re-characterised the conversion of those offshore programmes as the absorption of those programmes into MQA/PA 0927 see paras 47–51 above.

[116] The practical significance between absorption and conversion was never fully explained at trial; it may however be surmised that the number of students for each medical degree programme will be delimited from a practical perspective by the capacity of the hospital to which the students will be attached for the clinical phase of the degree programme. Accordingly, it can be anticipated that if a programme is absorbed into another, the overall quota of students may have to be reduced, as there will be a practical limit as to the number of students that a single hospital may accommodate. By contrast, where the programmes are separate, there will be different hospitals allocated to each programme.

[117] There was no reason for me to doubt the testimony of Dr Wan Mazlan (PW5), the then secretary of the MMC. He had no particular interest in the outcome of the trial, and so appropriate weight was given to his testimony as a disinterested witness. At trial, he came across as someone who genuinely desired to do the right thing but was hampered by obstacles put into his path.

[118] By contrast, the second defendant maintained throughout trial that the reason he had not evaluated MQA/PA 1561 and MQA/PA 1562 during the second survey panel visit was that there was not enough time to do so. He clearly was only telling a half-truth because on the morning of 16 April 2013 he made the unilateral declaration to the members of the survey panel and Dr Wan Mazlan that the two programmes had been absorbed into MQA/PA 0927. Later that day, he made the same assertion at the 315 meeting of the MMC. Yet in his communications with the MQA at around the same time, no mention was made of the absorption.

[119] The third instance that provided evidence of an improper motive was the fact that the survey panel chaired by the second defendant had recommended to the JTC that the plaintiff be given approval to take on just 50 students a year for the local medical degree programme MQA/PA 0927. The JTC did not adopt the panel's recommendation, and instead approved 100 students a year. Now, on its own this recommendation would appear innocuous. But taken together with the other two incidents, a picture is

painted that was suggestive of steps taken at every turn to suppress the available student quota of the medical degree programmes undertaken by the plaintiff. A

[120] I was of the view that the evidence presented to me was capable of supporting a finding of targeted malice against the second defendant. The evidential burden then lay with the second defendant to provide a credible explanation of a proper motive, specifically in respect of the imposition of the requirement for lecturers to be physically present, and the re-characterisation of the MQA/PA 1561 and MQA/PA 1562 medical programmes. No explanation was forthcoming, because the second defendant persisted with his version of events, which I found not to be representative of actual events. B C

Duty owed to the plaintiff, causation and remoteness

[121] I was of the view that all three remaining elements of the tort of misfeasance on public office have been satisfied: D

(a) *Duty to the plaintiff*. The House of Lords in the *Three Rivers* case held that a plaintiff must show sufficient legal interest to found a legal standing to sue, but that proximity need not be established. It follows therefore that a duty of care in negligence, which does require the element of proximity, represents a more onerous duty to establish. Since I have held at para 79 *et seq, ante* that a duty of care in negligence exists, *a fortiori* there must also exist a duty sufficient to found the basis of the tort of misfeasance in public office; E F

(b) *Causation*. I was satisfied that there has been damage occasioned to the plaintiff as a consequence of the actions of the second defendant in firstly requiring the presence of lecturers at the survey panel visit, and secondly in refusing to evaluate the MQA/PA 1561 and MQA/PA 1562 programmes during the second survey panel visit; and G

(c) *Remoteness*. I was of the view that the second defendant could not have not known that the consequences of his actions would probably cause the losses that was occasioned to the plaintiff. Hence the damages claimed cannot be said to be too remote. H

Vicarious liability

[122] Lord Steyn in the *Three Rivers* case referred to *Racz v Home Office* [1994] 2 AC 45 as authority that the principles of vicarious liability apply as much to misfeasance in public office as they do in respect of other fault-based torts. I

[123] Accordingly, for the same reasons explained at paras 96–97, I found that the MMC was liable to the plaintiff for the acts of the second defendant in relation to the tort of misfeasance in public office.

SUBMISSIONS BY THE DEFENDANT

[124] In the following paragraphs, I address the specific arguments raised by counsel for the defendants, to the extent that they have not been already addressed in the preceding paragraphs.

Section 110 of the Malaysian Qualifications Agency Act 2007

[125] It was advanced for the defendants that s 110 of the Malaysian Qualifications Agency Act 2007 immunised them from any action by the plaintiff. Section 110 provides:

> Section 110 Protection against suit and legal proceedings
>
> No action shall lie or prosecution shall be brought, instituted or maintained against —
>
> (a) the Agency, any member of its committees or any officer, employee or agent of the Agency;
>
> (b) the Council, any member of the Council, or any member of its committees;
>
> (c) the Joint Technical Committee or any of its member; or
>
> (d) any person lawfully acting on behalf of the Agency or the Council,
>
> in respect of any act, neglect or default done or committed by him or it in good faith or any omission omitted by him or it in good faith in such capacity.

[126] The first observation is that the expression 'Council' here refers to the Council of the MQA constituted pursuant to s 11 of the Act. It does not refer to the MMC. Hence, the only conceivable person who may seek to rely upon s 110 would be the second defendant, to the extent that he was a member of the JTC at the material time (it would appear from his own evidence that he was a member of the JTC only until 2011), and to the extent that it may be possible for s 110 to be extended to a member of a survey panel delegated to perform a function of the JTC.

[127] It is clear from its plain words that s 110 only provides protection in respect of acts or omissions in good faith. In the present case, I found that the plaintiff's contention of malice has been made out, for the reasons explained *passim*. As such, neither defendant was entitled, in my judgment, to rely upon s 110: the MMC could not do so because it did not come within the classes of

persons specified in s 110, and the second defendant could not do so because he had not acted in good faith.

The Public Authorities Protection Act 1948

[128] The defendants sought to rely upon s 2 of the Public Authorities Protection Act 1948, which provides as follows:

> Section 2 Protection of persons acting in execution of statutory or other public duty.
>
> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> (b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client;
>
> (c) where the proceeding is a suit or action for damages, tender of amends before the suit or action was commenced may be pleaded in lieu of or in addition to any other plea;
>
> (d) if the suit or action is commenced after the tender or offer in writing, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered, offered or paid, he shall not recover any costs incurred after the tender, offer or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender, offer or payment, and the costs up to the time of such tender, offer or payment shall be in the discretion of the court:
>
> Provided that this provision shall not affect costs on any injunction in the suit or action.

[129] The Public Authorities Protection Act 1948 applies in this case by virtue of s 111 of the Malaysian Qualifications Agency Act 2007, which provides as follows:

> Section 111. Public Authorities Protection Act 1948
>
> The Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution or proceedings against the Agency, Council, any member of the Council and its committees, any officer, employee or agent of the Agency and its committees and any member of the Joint Technical Committee in respect of any act, neglect or default done or committed by him in such capacity.

[130] It is thus clear that any claim against the second defendant (to the extent that he was a member of the JTC and to the extent that the provisions of s 111 applies to any panel member to whom the JTC has delegated its duties) must be brought within 36 months from the accrual of the cause of action.

[131] In this case, the earliest point at which the plaintiff's cause of action could be said to have accrued was 13 May 2011, which was the first day of the first survey panel visit. The plaintiff filed its writ on 6 February 2014, which was well within the period of limitation.

'Monitoring' visits

[132] Learned counsel for the defendant sought to argue that the visit in 2011 was not in actuality a survey panel visit but rather a 'monitoring' visit that was not subject to the Accreditation Guidelines.

[133] Counsel was, in my view — and there is no kinder way to put it — grasping at the proverbial straws. The Accreditation Guidelines do not make any distinction between survey visits or monitoring visits. Part of the confusion (if one exists at all) was due to the fact that the Accreditation Guidelines were written in English, whilst correspondence between the relevant parties were, in the main, in the national language. The only expression that was used in the Accreditation Guidelines was an accreditation survey visit by a survey team See B/12, para 5(b) of the Accreditation Guidelines. At trial, Prof Tan Sri Dato' Seri Hj Mohd Ismail Merican (PW4), a subpoena witness for the plaintiff, who was a former director general of the Ministry of Health and a past president of the MMC, testified that there was no difference in the terminology used to describe the various visits and that all such visits were part of the accreditation process. They were thus, in my judgment, subject to the requirements of the Accreditation Guidelines. PW4 had no particular interest in the outcome of the action. He came across as an impeccable witness who did not have any particular axe to grind.

CONCLUSION

[134] For the reasons explained in this judgment, I found the defendants liable to the plaintiffs for each of the pleaded causes of action. I directed that damages be assessed in subsequent proceedings before me, because the trial had proceeded only on the issue of liability. I also directed that costs be borne by the defendants in the amount of RM250,000, such costs to be subject to an allocatur.

Order accordingly.

Reported by Ashok Kumar